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No. 04-567

In the Supreme Court of the United States

TALMIDGE INTERNATIONAL, LTD., NEPTUNE SHIPMANAGEMENT SERVICES (PTE) LTD., AMERICAN EAGLE TANKERS, INC., LTD., AND THE BRITANNIA STEAMSHIP INSURANCE ASSOCIATION, LTD.,
Petitioners,

v.

VINOD KUMAR DAHIYA
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

While petitioners ultimately seek review of the enforceability of their claimed arbitration remedies, their appeal below was dismissed for lack of appellate jurisdiction after the district court remanded the suit to state court. Where, as here, the remand order is based upon the lack of subject matter jurisdiction, that order is statutorily immune from review on appeal. 28 USC 1447(d), *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976). Respondent cannot improve upon the concise explanation of the lack of appellate jurisdiction set forth in the panel opinion of the circuit court of appeals.

That the district court's remand order was based upon the lack of subject matter jurisdiction is patent. The notice of removal filed by petitioners in the U.S. district court expressly recited the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 USC 201, et seq. as the basis for federal jurisdiction. In fact, because the removal would have been untimely under any other basis of jurisdiction, the Convention was the only possible grounds for federal jurisdiction.[1] Whether the district court was right or wrong in finding that the purported arbitration agreement was unenforceable under the Convention, and therefore provided no grounds for removal under 9 USC 205, the remand order necessarily was based on the lack of subject

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[1] Contrary to the representation of the petition for certiorari (at p. 7), the district court's remand order expressly noted that the untimely removal waived bases for subject matter jurisdiction other than the Convention (see, Appendix B to petition for certiorari, at p. 45a).

matter jurisdiction, and was thus unreviewable as a matter of law.

"Without jurisdiction the court cannot proceed at all in any case. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 74 U.S. (7 Wall) 506, 514, 19 L.Ed. 264 (1868).

Of course, petitioners' characterization of the underlying substantive issue as whether an Act of the Louisiana Legislature can abrogate a treaty of the United States is a quintessential strawman argument. The statute enacted by the Louisiana Legislature merely evidences public policy of the State of Louisiana. That the public policy of the forum is a factor to be considered in assessing the enforceability of an arbitration agreement has long been established law.[2]

The relief sought by petitioners is particularly distant. To reach the underlying substantive issue of the enforceability of the purported arbitration agreement, the Court would have to traverse a labyrinth of jurisdictional and other obstacles. After the question of appellate jurisdiction, next would come the equally-fatal bar of res judicata (the circuit court of appeals initially dismissed the appeal as barred by res judicata due to the rulings denying petitioners' requested arbitration remedies in the state district, appellate and supreme courts, before withdrawing that ruling to instead

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[2] *M/S BREMEN v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972).

dismiss upon the threshold jurisdictional issue). After that would come multiple other substantive and procedural defenses to arbitration raised by respondent in the state and federal district courts, but not reached by those courts due to the either substantive (state) or jurisdictional (federal) determinations.

Should the Court be of the opinion that the underlying substantive issue is one which is of significance, the dissent to the circuit court of appeal's decision notes the pendency of another case in that court which squarely presents the identical substantive issue, but without the host of complications afflicting the petitioners' action.

Ultimately, what petitioners seek is the substantive review of a district court decision which petitioners contend amounts to a misapplication of a properly stated rule of law. This case does not present any of the compelling reasons which govern review on certiorari in this Court.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted:

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